SUBJECT INDEX

	PAGE
Citations to Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of Case	4
Reasons for Granting the Writ	7
I. Conflict Between a Recent Decision of the Second Circuit and the Decision Herein of the Eighth Circuit	7
II. Similar Cases Are Pending Across the Country	8
III. Conflict Between the Decision of the Eighth Circuit Herein and the Opinions of This Court	
a. Summary judgment criteria	10
b. Relevant market criteria	12
IV. This Is a Matter of Special Public Importance	14
Remand Under 28 U.S.C., Section 2106	14
Conclusion	14
Appendix A:	
Opinion of Court of Appeals	A-1
Appendix B:	
Denial of Rehearing Petition	A-3
Appendix C:	
Order and Memorandum of District Court	A-4
Appendix D:	
Statutes Involved	A-6
Appendix E:	
Newspaper Story Re Minnesota Attorney General	A-8
Appendix F:	
Press Release by Massachusetts Attorney General	A-9

TABLE OF AUTHORITIES

PAGE

Cases:

Acme Precision Products, Inc. v. American Alloys Corp., 1973-2 Trade Cases, para. 74,711 (8th Cir. 9/25/73), 484 F. 2d 1237 13

Bragen v. Hudson County News Company, 278 F. 2d 615 (3rd Cir. 1960), 1960 Trade Cases, para. 69,724 11

Brown Shoe Co. v. United States, 370 U.S. 294 (1962), 82 S. Ct. 1502, 1962 Trade Cases, para. 70,366 13

Coniglio v. Highwood Services, Inc., 1973 Trade Cases, para. 74,314 (W.D.N.Y. 9/18/72) 60 F.R.D. 359 ..... 7, 8, 14

Coniglio v. Highwood Services, Inc., 1974 Trade Cases, para. 75,016 (2nd Cir. 4/17/74) 5, 8

Driskill v. Dallas Cowboys Football Clubs, 1973 Trade Cases, para. 74,544 (D. Tex. 6/1/73) 8

Flood v. San Francisco Forty-Niners (N.D. Calif.), No. C-72-1704-WTS 9

Fortner v. U.S. Steel Corp., 394 U.S. 495 (1969), 89 S. Ct. 1252 10

Grossman Development Co. v. Detroit Lions, Inc., 1973-2 Trade Cases, para. 74,790 (E.D. Mich. 11/16/73) 4, 8

International Boxing Club v. United States, 358 U.S. 242 (1959), 79 S. Ct. 245 ..... 13, 14

Kansas City Star Company v. United States, 240 F. 2d 643 (8th Cir. 1957), 1957 Trade Cases, para. 68,601 6

PAGE

Montgomery Ward & Co. v. Langer, 168 F. 2d 182 (8th Cir. 1948) 11, 12
Pfeiffer v. Patriots, 1973 Trade Cases, para. 74,267 (D. Mass. 7/25/72) 9
Poller v. Columbia Broadcasting Systems, Inc., 368 U.S. 464 (1962), 82 S. Ct. 486 11
Radovich v. N.F.L., 352 U.S. 445 (1957), 77 S. Ct. 716 14
Shayne v. Madison Square Garden, 1974 Trade Cases, para. 74,920 (E.D.N.Y. 1/9/73), Class Action Appeal denied in 1974 Trade Cases, para. 74,886 (2nd Cir. 1/22/74) 12
Skye v. New Orleans Saints, Inc., E.D. La. Civ. No. 722331 8
United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377 (1956), 76 S. Ct. 994 13
United States v. Grinnell Corp., 384 U.S. 563 (1966), 86 S. Ct. 1698 13
United States v. Loew's, Inc., 371 U.S. 38 (1962), 83 S. Ct. 97 12

Statutes:

Sherman Act, Sec. 1, 15 U.S.C., Sec. 1 ..... 3, 4
Clayton Act, Secs. 3, 4 and 16, 15 U.S.C., Secs. 3, 4 and 16 ..... 3, 4
28 U.S.C., Sec. 1254(1) 2
28 U.S.C., Sec. 2106 ..... 3, 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. .....

NORBERT A. LAING, an individual, on behalf of himself and all other persons, associations, firms and corporations similarly situated,

Petitioner,

vs.

MINNESOTA VIKINGS FOOTBALL CLUB, INC. John Doe, Richard Roe, et al., A.B.C., Inc., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner (hereinafter, "Laing"), an individual sports fan in Minnesota, petitions this Court to issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit entered in this case on February 11, 1974, with Petition for Rehearing En Banc denied, without opinion, by Order entered on April 3, 1974, resulting in summary judgment against Laing on the antitrust "tying" violations he alleged against Respondent (hereinafter, "Vikings") professional football team headquartered in Bloomington, Minnesota and playing in the National Football League.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals, dated February 11, 1974, is reported in 1974 Trade Cases, para. 74,913 and is reprinted in Appendix A hereto. The Appeals Court Denial of Rehearing Petition dated April 3, 1974, is reprinted in Appendix B hereto. The opinion of the District Court is reported in 1973-2 Trade Cases, para. 74,601 and is reprinted in Appendix C hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 1974, and the Petition for Rehearing En Banc was denied by Order entered on April 3, 1974 and this Petition filed within 90 days thereafter. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

First, where Laing, the ticket-buying sports fan, established that there were preferential practices and that only a maximum of 2,500 individual game tickets were available for some games in a given season, was it not error for the District Court and the Court of Appeals to hold that no fact question existed regarding the element of coercion on the sports fan and to thereon grant summary judgment against the antitrust claim of "tying" exhibition game tickets to tickets for championship season games?

Second, where Laing argued and produced facts in the record showing the existence of actual competition between

the Vikings and numerous other professional sports teams for the dollars of the sports fans in the Minneapolis-St. Paul, Minnesota, geographic metropolitan area (e.g., Minnesota Twins baseball team and Minnesota North Stars hockey team) was it not error for the Court of Appeals to additionally hold that no fact question existed regarding the element of anti-competitive effects?

Alternatively, was it not error for the Court of Appeals to require such competitive effect in light of the monopolistic interference with the consumer's freedom of choice?

Alternatively, regardless of whether or not competitive sports are determined to exist, could not a restraint on commerce be found by removing from the commercial market place discretionary consumer dollars that must now go to purchase tickets to exhibition games?

Alternatively, was it not error in abuse of discretion for the Court of Appeals to refuse remand for further proceedings as authorized under 28 U.S.C. section 2106, where the District Court expressly did not address itself to the anti-competitive effect issue and neither court addressed the important *fact* of a four ticket per game limit on single game purchases for certain games?

STATUTES INVOLVED

The statutory provisions are Section 1 of the Sherman Act, 15 U.S.C. Sec. 1, Sec. 3, 4; and 16 of the Clayton Act, 15 U.S.C., Sec. 3, 4 and 16. Alternatively, remand is asked under 28 U.S.C., Sec. 2106. These are printed in Appendix D hereto.

STATEMENT OF CASE

This is an Antitrust Class Action. In order to obtain "season tickets" to Vikings games, it is compulsory that a fan buy a package consisting of all exhibition and championship season home games. Laing is a purchaser of season tickets and complains that the "tying" of the sale of exhibition game tickets to the sale of tickets to championship season games violates Section 1 of the Sherman Act (15 U.S.C. 1) and Section 3 of the Clayton Act (15 U.S.C. 14). Treble damages and injunctive relief are sought under Sections 4 and 16 of the Clayton Act (15 U.S.C. 15 and 26).

The Vikings made a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The Honorable Earl R. Larson of the Federal District Court, District of Minnesota, Fourth Division, granted said motion and in so doing considered only the "coercion" question and found that "as a practical matter" the Vikings made available individual game tickets. He expressly declined to consider the "competitive effect" question. (App. C hereto).

Appeal was taken by Laing to the Eighth Circuit which, without discussion (except for a concurrence by Judge Lay), adopted the view of the District Court on the "coercion" question and further cited the Detroit Lions case of *Grossman Development Co. v. Detroit Lions, Inc.*, 1973-2 Trade Cases, para. 74,790 (E.D. Mich. 11/16/73) on the "competitive effect" issue even though that particular issue was not joined before that District Court by that plaintiff on the facts.

From the birth of the Minnesota Vikings, Laing purchased the so-called "season ticket" package. That is, tickets covering all home games, be they "*exhibition*" or "*championship season*" games. Laing is in business as a manufacturers' sales

representative and first purchased a block of eight season tickets but in 1968, cancelled two of the eight seats by way of protest against the "tying" of exhibition games to championship season games. To date hereof he has continued his purchase of six season tickets.

The Record before the Trial Court showed that the individual game tickets offered for sale outside of the season ticket package went as low as only 2,500 tickets for certain games.

It is also important to note that the Record (Arneson Deposition 10/9/72, Exhibit 4) showed that a further *four ticket per game* limitation on individual game sales was imposed by the Vikings for certain games. That contrasted with Laing's eight and then six season tickets per game purchases.

With regard to the anti-competitive effect question of *relevant market*, the Record abounds with facts and argument by Laing that the relevant market is comprised of at least the many professional sports in the Minneapolis-St. Paul Metropolitan geographic area and if not so limited then at most as broadly as the "entertainment Market in Minnesota" (a characterization quoted directly from the Vikings brief, at page 4, opposing class action in the Buffalo case of *Coniglio vs. Highwood Services, Inc.*, 1973 Trade Cases, para. 74,314 (W.D. N.Y. 9/18/72). Laing argued and does further herein that the relevant market is a fact question to be determined by the test of reasonable interchangeability or cross-elasticity of demand. That test is certainly satisfied by the Record herein on the various professional sports in Minnesota (two years ago can be added a World Hockey Association team and now a World Tennis Team) competing for the dollar of the sports fan in general and Laing in particular.

The Record (Fink's Deposition p. 51, lines 1-10) showed that the Vikings and Twins (baseball) were stadium co-

tenants at the *same* time of the playing of Vikings exhibition games. The Record (Arneson Deposition, 10/9/72, pp. 9, 51-57) showed that the Vikings had to wait until the end of the Twin's baseball season before certain stadium seats became available for football. Laing showed that the North Stars (hockey) play in a building with a parking lot common to the Vikings' stadium. Both the Twins and North Stars were shown to play at the same time of year as the Vikings games. Laing's affidavit showed he also purchased season tickets to the North Stars, who do not "tie" exhibition games. Further, Laing showed that the Vikings by their prepayment policy withdrew sports dollars from the market in the Winter and Spring playing seasons of other sports. Laing had expressly made this aspect part of his verbal protestations to the Vikings beginning in 1968.

The recent pithy comment of a St. Paul, Minnesota sports writer on low World Hockey Association professional hockey crowds is appropriate here:

> "Like I've said before, in the *fall* in the Twin Cities, they split that entertainment buck like a carnival." (Emphasis added.)

Don Riley, St. Paul Pioneer Press 19. Monday, November 12, 1973.

Laing relied on the language of the Eighth Circuit in *Kansas City Star Company vs. United States*, 240 F. 2d 643, 658 (8th Cir. 1957), that as to the forced combination rate therein requiring the purchase of thirteen papers a week, the jurors could conclude that the average subscriber would not be likely to buy competing newspapers. The sports fan is in a similar position as regards his sports dollar.

REASONS FOR GRANTING THE WRIT

I

CONFLICT BETWEEN A RECENT DECISION OF THE SECOND CIRCUIT AND THE DECISION OF THE EIGHTH CIRCUIT HEREIN

There can be no doubt that had Laing been before the Second Circuit he would have prevailed in light of that Court's position as recently expressed in *Coniglio vs. Highwood Services, Inc.*, 1974 Trade Cases para. 75,016 (2nd Cir. 4/17/74). The opinion by Chief Judge Kaufman in that case favorably cites Judge Lay's concurring language herein leaving the coercion question to a fact determination, 1974 Trade Cases para. 75,016, at 96,489.

Further, the Second Circuit opinion first cites without comment the Eighth Circuit herein and then almost laments the overly broad position taken by that plaintiff on the question of relevant market and concludes it could cover everything ". . . from a trip to the zoo to a night at the opera." That Court concluded that the "extraordinary breadth" of the relevant market position taken by that plaintiff was beyond that ever contemplated for relevant market. 1974 Trade Cases para. 75,016 at 96,491.

Diametrically opposite to the Buffalo plaintiff, Laing argued and as shown in the Record, the existence of direct competition between the professional sports teams of at least the Minnesota Vikings and the Minnesota Twins (baseball) and the Minnesota North Stars (hockey) and certainly his "breadth" of market would have easily satisfied the Second circuit that a fact question existed.

The Eighth Circuit did not even express an opinion on this question other than to simply cite the Detroit Lions case,

supra, wherein as pointed out by Laing the issue was not joined on the facts before the District Court and instead the plaintiff pressed the interference with the consumers free choice.

The Vikings were dismissed out in Buffalo because of facts peculiar to their locality. *Coniglio vs. Highwood Services, Inc.*, 1973-1 Trade Cases, para. 74,314, at 93, 460 (W.D.N.Y. 9/18/72). For Laing to be denied a determination based on the particular facts he has developed and argued is justice denied to the sports fans of Minnesota.

II

SIMILAR CASES ARE PENDING ACROSS THE COUNTRY

A. DETROIT LIONS

Grossman Development Co. vs. Detroit Lions, Inc., supra is on appeal to the Sixth Circuit and is presently being briefed.

B. DALLAS COWBOYS

Richard E. Driskill vs. Dallas Cowboys Football Club, 1973 Trade Cases para. 74,544 (D. Tex. 1973), where the District simply fell in line, is now on appeal to the Fifth Circuit and has recently been argued.

C. NEW ORLEANS SAINTS

William E. Skye vs. New Orleans Saints, Inc., E.D. La. Civ. No. 722331, is reported to be held in submission by the District Court waiting the Dallas appeal although a class has been determined.

D. BUFFALO BILLS

Coniglio vs. Highwood Services, Inc., supra. It is anticipated that a Petition for a writ of certiorari will be forthcoming.

E. SAN FRANCISCO FORTY-NINERS

Lawrence Flood vs. San Francisco Forty-Niners, N.D. Calif. No. C-72-1704-WTS., has had a summary judgment motion by defendant under submission for many months now.

F. NEW ENGLAND PATRIOTS

Pfeiffer vs. Patriots, 1973 Trade Cases para. 74,267 (D. Mass. 7/25/72). The appeal of summary judgment for defendant was voluntarily withdrawn by the plaintiff. However, the team changed its ticket policy by agreement with the office of the Attorney General of Massachusetts, (App. F hereto). On Tuesday, April 23, 1974, the San Francisco Examiner at page 49, published a V.P.I. story that the Massachusetts' House had given initial passage to a bill to further liberalize the sale of Patriot tickets by prohibiting *any* linking of exhibition games tickets to regular season games via seat preference for those taking the full package. It is important to note also that the bill was reported to affect other Massachusetts-based professional sports teams. This latter aspect of course ties right in with this Petitioner's relevant market argument of other professional sports teams being part of the relevant market.

G. MIAMI DOLPHINS

Ellis S. Rubin vs. Miami Dolphins, 74-129-Civ.-C.A. (S.D. Fla.). The defendant filed a motion in April, 1974, for summary judgment.

III

CONFLICT BETWEEN THE DECISION BY THE EIGHTH CIRCUIT HEREIN AND THE OPINIONS OF THIS COURT

A. Summary Judgment Criteria

On point here is the reversal of a defendant's summary judgment by this Court in the leading tying case of *Fortner Enterprises vs. U.S. Steel Corp.*, 394 U.S. 495, 499-500 (1969). The opinion by Justice Black held:

> "A preliminary error that should not pass unnoticed is the District Court's assumption that the two prerequisites mentioned in *Northern Pacific* are standards that petitioner must meet in order to prevail on the merits. On the contrary, these standards are necessary only to bring into play the doctrine of *per se* illegality. Where the standards were found satisfied in *Northern Pacific* and in *International Salt Co., vs. United States*, 332 U.S. 392, 92 L. Ed. 20, 68 S. Ct. 12 (1947), this Court approved summary judgment *against* the defendants but by no means implied that inability to satisfy these standards would be fatal to a plaintiff's case. A plaintiff can still prevail on the merits whenever *he can prove, on the basis of a more thorough examination of the purposes and effects of the practices involved, that the general standard of the Sherman Act have been violated.* Accordingly, even if we could agree with the District Court that the *Northern Pacific* standards were not satisfied here, the summary judgment against petitioner *still could not be entered without further examination of petitioner's general allegations that respondents conspired together*

> *for the purpose of restaining competition and acquiring a monopoly in the market for prefrabricated houses.*" (emphasis added.)

This Court immediately continued, stating, "*And such an examination could rarely justify summary judgment with respect to a claim of this kind . . .*" (citing Poller) (emphasis added). Laing has alleged a conspiracy involving other N.F.L. teams and the League's governing body.

The Eighth Circuit did not address itself to the question of summary judgment criteria but its holding clearly conflicts with the oft-quoted *Poller vs. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 473 (1962), where this Court said, that:

> "Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even-handed justice.'"

Similarly, see also, the Third Circuit in the "tying" magazine case of *Bragen vs. Hudson C ..y News Company*, 278 F. 2d 615, 617 (3rd Cir. 1960), listing certain well-settled principles against summary judgment and citing the Fifth, Ninth and Tenth Circuits, while reversing summary judgment for defendant.

This Court in *Radovich vs. National Football League*, 352 U.S. 445, 453 (1957), said:

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade.'"

The opinion by Mr. Justice Clark went on to conclude, 352 U.S. at 454:

> "We think that Radovich is entitled to an opportunity to prove his charges."

The Eighth Circuit itself has so admonished in the leading case of *Montgomery Ward & Co. vs. Langer*, 168 F. 2d 182,

188 (8th Cir. 1948), reversing dismissal of a libel complaint:

> "This Court has said that no matter how improbable it is that a plaintiff can prove the claim stated in his complaint, he is entitled to an opportunity to make the attempt."

B. Relevant Market Criteria

There should be no confusion today on the test for relevant market because the movie "block booking" cases of some ten or so years ago applied the test of interchangeability. The leading case of this Court is *United States vs. Loew's, Inc.*, 371 U.S. 38 (1962). There, each copyrighted film block booked was found to be in itself a unique product and not fungible and therefore the monopolistic position resulted in sufficient economic power to impose an appreciable restraint on free competition in the tied product. The court said that the stations that were *forced to take unwanted films were denied access to other films.* Then the opinion stated:

> "By the same token, the distinctiveness of the copyrighted tied product is not inconsistent with the fact of competition, in the form of other programming material and other films, which is suppressed by the tying arrangements." 371 U.S. 38, at 49. (Emphasis added.)

Similarly herein, other sports-entertainment is suppressed.

Judge Dooling in *Shayne vs. Madison Square Garden* (sports ticket tying case), 1974 Trade Cases para. 74,920, at 96,124, (E.D.N.Y. 1/9/73) cited the *Loew's* decision and said:

> "Common to all of the cases is the visualization of competing suppliers of the tied product or *something that adequately substitutes for it.*" (Emphasis added.)

Judge Dooling *supra*, at 96,125, although denying class action status because of the strength of the plaintiff, used the words

"interchangeable" and "substantial products," and he used "substitutional or alternative products, and suppliers)" in relation to the season ticket subscriber. The relative market obviously should include at least the professional sports events in Minnesota.

Chief Judge Kaufman cites and quotes, *supra*, at 96,491, this Court in *Brown Shoe Co. vs. United States*, 370 U.S. 294, 325 (1962) delineating the outer boundaries of a product market by the test of " '*reasonable interchangeability of use or the cross elasticity of demand between the product itself and* substitutes for it'." (Emphasis added.) Under such a test it is hard to fathom why the argument and Record established by Laing did not survive summary judgment before the Eighth Circuit.

The Eighth Circuit itself in the Section 2 patent monopoly case of *Acme Precision Products, Inc. vs. American Alloys Corp.*, 1973-2 Trade Cases para. 74,711 (8th Cir. 9/25/73) at 95,146, cited this Court in *U.S. vs. Grinnell Corp.*, 384 U.S. 563 (1966); *International Boxing Club vs. U.S.*, 358 U.S. 242 (1959); and especially *U.S. vs. E. I. DuPont de Nemours & Co.*, 351 U.S. 377 (1956), as holding relevant market to be essentially a fact question of *reasonable interchangeability for consumers* but failed to expressly apply it to *Laing*.

IV

THIS IS A MATTER OF SPECIAL PUBLIC IMPORTANCE

A newspaper story published in the St. Paul Pioneer Press at the time Laing filed his suit is reprinted in Appendix E hereto. It quoted the Minnesota Attorney General in agreement with Laing's suit and he said that generally he does not comment on a pending suit.

The Massachusetts Attorney General issued a press release on the ticket policy change agreed to by the Patriots. It is reprinted in the Appendix F hereto. As noted elsewhere herein, the Massachusetts legislature has now taken up the cudgel against professional sports tying tickets together between exhibition and regular season games.

Remand 28 U.S.C., Section 2106

Alternatively, Laing asks this Court to remand this to have the lower Courts expressly address the relevant market issue on the particular factual Record herein and to also address the effect of the 4 per game single ticket limit on the fact question of coercion. At oral argument, the District Court queried the Viking's counsel as to the Record having some indication that individual game tickets were limited to four but carried it no further. That is as far as either court went in expressly considering the four ticket limit question.

CONCLUSION

Professional football and other such sports (except baseball) are today not exempt from the antitrust laws, *Radovich vs. N.F.L.*, 352 U.S. 445, 452 (1957), and *International Boxing Club vs. United States*, 358 U.S. 242 (1959), yet that does seem to be the practical result of the summary dispositions by the lower courts to date of the football ticket claims. The sports fan should not be denied his day in Court. To him it is important. Chief Judge Kaufman said that *Coniglio* could only successfully traverse three quarters of the field, *supra*, at 96,490. However, it is clear that *Laing* could successfully

traverse the entire field to cross the goal line and reverse this summary judgment because that opinion speaks in terms of "general entertainment market", "movies," "live theater", "music programs", "plays", "musicals", "zoo", and "opera", *supra*, at 96, 491, while in contradistiction, *Laing* rifled in and presented hard core facts and argument on competing professional sports teams directly bearing on the factual question of relevant market.

In the furtherance of justice for the reasons shown herein, this Petition for Writ of Certiorari should be granted by this Court.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 73-1625

NORBERT A. LAING, an individual, on behalf of himself and all other persons, associations, firms and corporations similarly situated,

Appellant,

vs.

MINNESOTA VIKINGS FOOTBALL CLUB, INC., John Doe, Richard Roe, et al., A.B.C., Inc., et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

Submitted: January 17, 1974
Filed: February 11, 1974

Before MEHAFFY, Chief Judge, LAY and ROSS, Circuit Judges.

PER CURIAM.

The judgment below is affirmed on the basis of the district court's opinion, and on the ground that there is no anti-competitive effect. *See Grossman Development Co. v. Detroit Lions, Inc.*, Civil Action No. 37652 (E.D. Mich. Nov. 16, 1973).

LAY, Circuit Judge, concurring.

I concur in the affirmance of the district court's judgment on the ground that plaintiff has demonstrated no anti-competitive effect flowing from the Minnesota Vikings Football Club's requirement that a season ticket holder purchase tickets to the exhibition games along with regular season games. The basis of the district court's grant of summary judgment, i.e., that there existed no "coercive effect" since there were available some regular tickets (approximately 2,500 to 4,000) for purchase by the general public for each game gives me concern. It is difficult for me to say as a matter of law that no coercion exists. Assuming the other elements of a "tie-in" could be proved, I would think whether coercion exists is a question of fact to be evaluated in light of all of the attendant circumstances.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
September Term, 1973

No. 73-1625.

NORBERT A. LAING, etc.,

Appellant,

vs.

MINNESOTA VIKINGS FOOTBALL CLUB, INC.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA.

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

April 3, 1974

APPENDIX C

(Caption)

ORDER

Defendant has filed a motion for Summary Judgment.

The Court has considered the arguments, briefs of counsel, and affidavits submitted by the parties for the Court's consideration of this motion.

On all the files and proceedings herein,

IT IS ORDERED:

That defendant's motion for Summary Judgment be granted.

July 6, 1973.

EARL R. LARSON
United States District Judge

Memorandum attached.

MEMORANDUM

Defendant Minnesota Vikings Football Club, Inc. (hereinafter "Vikings"), moves the Court for summary judgment of this antitrust action. Vikings is a corporation engaged in the business of professional football. Plaintiff is the purchaser of season tickets to Vikings games and he seeks to maintain this action on behalf of a class consisting of all persons who purchased Vikings season tickets in the years 1968, 1969, 1970 and 1971.

Plaintiff's allegation is that defendant is guilty of violation of Section 3 of the Clayton Act and Section 1 of the Sherman Act because defendant illegally "tied" the purchase of tickets to preseason home games to the purchase of tickets to regular season home games. It is alleged in the complaint that "Purchasers of 'season tickets' to regular season 'home' games were required to purchase pre-season tickets regardless of whether

or not said purchasers wanted the tickets to said pre-season 'home' games," and that "defendant refused to sell so-called 'season tickets' to regular-season 'home' games unless tickets to all pre-season 'home' games are [sic] purchased therewith."

From the record now before the Court it is clear that, as a practical matter, defendant has made available individual game tickets. As stated in the August 28, 1972, affidavit of James Finks, Vice President and General Manager of defendant:

> "In 1968 there were approximately 13,000 tickets available for purchase for each regular season home game to individuals who wished to buy regular season game tickets on an individual game basis; in 1969 there were 9,500 tickets available for purchase on that basis; in 1970 there were 5,100 tickets available for purchase on that basis; and in 1971 there were from 2,500 to 4,100 tickets available for purchase on that basis."

Plaintiff does not dispute these figures. [See, Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment at 8.]

The Court is of the view that no claim of "tying" violative of the antitrust laws can stand in light of these facts. While individual game tickets remain available, it cannot be said that defendant has structured the marketing of its tickets in such a way that consumers are compelled to buy something they don't want in order to obtain something they do want.

This Court's conclusion that defendant's merchandising of tickets does not present the requisite compulsion on consumers to support an antitrust "tying" claim comports with the opinion of Judge Garrity in *Pfieffer v. New England Patriots, et al*, No. 71-2501-G (D. Mass. 1972). *Cf., Driskill v. Dallas Cowboys Football Club, Inc.*, No. CA-3-6313-D (N.D. Texas, 1973).

Having concluded that the critical element of consumer compulsion is here lacking, the Court must grant defendant's summary judgment motion and need not consider the "single product" issue nor the "anti-competitive effect" issue argued by the parties on this motion.

EARL R. LARSON

APPENDIX D

Section 1, Sherman Act
July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209; 15 U.S. Code, Sec. 1.

Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *.

Section 3, Clayton Act
October 15, 1914, Chap. 323, Sec. 3, 38
Stat. 731; 15 U.S. Code, Sec. 14.

Section 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such

lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Section 4, Clayton Act

October 15, 1914, Chap. 323, Sec. 4, 38 Stat. 731; 15 U.S. Code, Sec. 14.

Section 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 16, Clayton Act

October 15, 1914, Chap. 323, Sec. 16, 38 Stat. 737; 15 U.S. Code, Sec. 26.

Section 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions

of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

Title 28 U.S. Code, Sec. 2106

Sec. 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

APPENDIX E

SPANNAUS SAYS LAING HAS CASE

Minnesota Attorney General Warren Spannaus said Thursday he believes the man who filed a suit against the Minnesota Vikings has a strong case in protesting the inclusion of pre season games in the season ticket book.

Norbert A. Laing, Bloomington, has filed a suit in U.S. District Court against the Vikings claiming the National Football League team's policy violates federal antitrust laws.

"We investigated the situation here," said Spannaus, "and were considering antitrust. But we figured other antitrust cases had priorities because they affected more people.

"Generally speaking, I don't like to comment on a suit pending in court. But here I think Laing and his attorney have a strong case."

The suit asks the court to restrain the Vikings from including preseason games in the sale of season tickets, declare the

practice illegal and to order the club to reimburse Laing and other season ticket holders cost of preseason games since 1968.

Jim Finks, Viking general manager, said the team will defend its position in court.

[St. Paul Pioneer Press, October 1, 1971, page 21]

APPENDIX F

Robert H. Quinn
Attorney General

Commonwealth of Massachusetts
(617) 727-2210

FOR RELEASE:
MONDAY, DECEMBER 20, 1971

Atty. Gen. Robert H. Quinn and Bill Sullivan, President of the New England Patriots Football Club, today announced that a solution had been reached in selling Patriots season ticket packages.

The decision culminated many conferences between the Atty. Gen. and members of his staff and Atty. William F. Finucane, General Counsel for the Patriots, and Bill Sullivan.

The Atty. Gen. had previously expressed several questions about the 1971 season ticket program. As a result of the presentation of the Patriots, however, he stated that he would take no further action with respect to the 1971 program. He added that the format of the 1972 season ticket program resolved all the questions he had.

The plan which met with the approval of the Atty. Gen.'s staff and the Patriots is as follows:

1. The Patriots will send out to renewing season ticket holders a letter accompanied by an invoice for a ten-game package and a form which will provide the purchaser with the opportunity to release the tickets for the three pre-season games if he does not wish to purchase same.

2. If such tickets are released they will then be made available in a three-game package on a first-come, first-served basis, but the original holder of the tickets will forfeit his right to renewal of same in future years, as the location for the three-game package will then become the property of the new buyer of same.

3. New season tickets holders can buy either the ten-game or the seven-game or the three-game package. In the case of the ten-game package and the seven-game regular season package tickets will be allocated on a first-come, first-served basis with no preference being extended to those who buy ten as against those who purchase only seven.

The three-game pre-season package will feature longstanding National Football League teams—the Chicago Bears, the Detroit Lions and the New York Giants.

Speaking on behalf of the Patriots, Sullivan expressed appreciation to the Atty. Gen. and all the members of his staff.

SUPREME COURT OF U.S.
JUN 12 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1716

NORBERT A. LAING, an individual, on behalf of himself and all other persons, associations, firms and corporations similarly situated,

Petitioner,

vs.

MINNESOTA VIKINGS FOOTBALL CLUB, INC., John Doe, Richard Roe, et al., A.B.C., Inc., et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1800 Midwest Plaza
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324-7633 — Sutton Publishing Co., 227 E. 6th St., St. Paul, Minn. 55101 — 224-7633

IN THE

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Petitioner,

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MINNESOTA VIKINGS FOOTBALL CLUB, INC., John Doe, Richard Roe, et al., A.B.C., Inc., et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Minnesota Vikings Football Club, Inc. (hereinafter sometimes referred to as the "Vikings") opposes the petition of Norbert A. Laing for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit on the basic ground that there are no special or important reasons for granting the writ, within the meaning of Rule 19 of the Rules of the Supreme Court.

QUESTION PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit (hereinafter referred to as the "Court of Appeals") erred in affirming the District Court's order for summary judgment in favor of the Vikings, holding that with respect to the Vikings' sale of season ticket packages consisting of tickets for both pre-season and regular season home football games, there was no genuine issue as to any material fact and that as a matter of law there was no violation of Section 1 of the Sherman Act or Section 3 of the Clayton Act because (a) there was no tie, no coercion—Laing could purchase regular season game tickets without purchasing pre-season game tickets; and (b) even if there were a tying arrangement, Laing did not demonstrate any anti-competitive effect flowing from the sale of season ticket packages.

STATEMENT OF CASE

The undisputed facts before the District Court may be briefly summarized as follows:

The Vikings is a Minnesota corporation, with its principal place of business in Edina, Minnesota. At all times material herein, it was engaged in the business of professional football. During each of the years in question—1968 through 1971—the Vikings played nine home games—two pre-season games and seven regular season games. During those years, the Vikings sold only one kind of season ticket package, viz., a season ticket for both pre-season and regular season games. During each of the years mentioned, after season tickets had been sold by the Vikings, and prior to the playing of any pre-season home games, tickets for regular season home games were offered for sale on an individual game basis to the extent that they were available. The stadium where the Vikings played their home games had a seating capacity of approximately 47,000 seats. The tickets available on an individual game basis for regular season games ranged from 13,000 tickets in 1968 to from 2,500 to 4,100 tickets in 1971.

In the District Court, the Vikings moved for summary judgment in their favor on the ground, among others, that (1) pre-season game tickets were not tied to regular season game tickets, i.e., there was no tie at all; and (2) even if there were a tying arrangement, there was no evidence before the court showing any anti-competitive effect as a result of the sale of season ticket packages. The District Court granted summary judgment in favor of the Vikings on the first ground, viz., there was no "tie", no compulsion on consumers that pre-season game tickets be purchased in order to obtain regular season tickets; and the Court did not consider the second ground.

In the Court of Appeals, the Vikings urged that the District Court's Order be sustained not only on the ground relied upon by that Court, but also on the second ground urged upon the District Court, but not considered by it. The Vikings contended that it was entitled to urge before the Court of Appeals in support of the District Court's Order any ground that would find support in the record. The Court of Appeals affirmed the order for summary judgment on the ground relied upon by the District Court and on the additional ground that there was nothing in the record to show any anti-competitive effect flowing from the sale of season ticket packages.

LACK OF ADEQUATE GROUNDS FOR CERTIORARI

In his petition for a writ of certiorari, Laing has demonstrated a lack of appreciation of the factors which might properly persuade the Supreme Court, in its sound judicial discretion, to grant the petition.

The main thrust of the petition is that the District Court and the Court of Appeals were in error in holding that there was no genuine issue as to any material fact and in concluding as a matter of law that there was no violation of the federal anti-trust laws.

The decision by each of those two Courts turned on an analysis of the factual record before the District Court and on the application of well established case law to those facts. Even if it were to be assumed *arguendo* that the Court of Appeals was in error, nevertheless this is not a case for certiorari. In determining whether certiorari jurisdiction should be exercised, the Supreme Court is not concerned with the mere correction of errors in a lower court decision, especially when that decision turns solely upon an analysis of the particular facts involved.

Nevertheless, Laing attempts to bring the instant case within the framework of certain grounds specified in Rule 19 of this Court as a basis for certiorari.

1. Claimed Conflict Between Eighth Circuit and Second Circuit.

Laing contends that the Court of Appeals for the Second Circuit in *Coniglio v. Highwood Services, Inc., et al.*, 1974 CCH Trade Cas. ¶ 75, 016 (2d Cir., 1974) has rendered a decision in conflict with the decision of the Court of Appeals for the Eighth Circuit in the instant case.

It is incomprehensible to the Vikings how Laing can claim that the decision in *Coniglio* is in conflict with the decision by the Court of Appeals in the instant case. In both cases, summary judgment in favor of the football club was affirmed.* In both cases, the court of appeals held that the plaintiff had failed to bring out facts showing what the relevant market was and failed, as a matter of law, to demonstrate any anti-competitive effect on that market.

It is true that the two courts did differ on whether there was a fact issue with respect to the question of the existence of a tying arrangement. But that difference is not the kind of conflict contemplated by Rule 19. There is no conflict on the same matter. The determination of whether there was a fact issue on the question of the requisite coercive power to

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* Laing parenthetically refers to "similar cases pending across the country". It so happens that every decided case involving football season tickets has been decided in favor of the football club on a motion for summary judgment. See *Pfeiffer v. New England Patriots Football Club, Inc.*, 1973-1 CCH Trade Cas. ¶ 74,267 (D. Mass., 1972), appeal dismissed, No. 72-1306 (1st Cir., 1972); *Driskill v. Dallas Cowboys Football Club, Inc.*, 1973-1 CCH Trade Cas. ¶ 74,544 (N.D. Texas, 1973); *Grossman Development Co. v. Detroit Lions, Inc.*, 1973-2 CCH Trade Cas. ¶ 74,790 (E.D. Mich., 1973); *Rubin v. Miami Dolphins, Ltd.*, (S.D. Fla., May 22, 1974) (See Appendix A).

constitute an illegal tying arrangement was based upon the factual record in each particular case. And if a court in one case says that a fact question exists, and a court in another case with a different factual record says that there is no fact issue, we do not have the kind of conflict that would warrant the granting of certiorari. That kind of conflict is not a conflict on an important issue, nor is it a conflict that can be effectively resolved by the prompt action of the Supreme Court alone.

2. Claimed Conflict Between Eighth Circuit and Supreme Court.

Laing seems to argue that the decision of the Court of Appeals in the instant case is in conflict with decisions of the Supreme Court of the United States.

In the first place, the basis set forth in Rule 19 of the Rules of this Court as one of the reasons that this Court might grant certiorari is that a decision on a *federal question* is in conflict with decisions of this Court. Nowhere does Laing point to a *federal question* as the subject matter of the claimed conflict. Secondly, there is in fact no conflict between the Court of Appeals and this Court at all. Both the Court of Appeals and this Court have made it clear that summary judgment should not be granted when a fair examination of the factual record discloses a material fact issue. What Laing is complaining of is the application of that principle to the instant case. The Court of Appeals concluded that Laing produced no facts before the District Court which created a fact issue that was relevant either to the question of an illegal tying arrangement or to the question of any anti-competitive effect. Laing may quarrel with this conclusion, but he has not shown that the Court of Appeals departed from any criteria established by

the Supreme Court for determining whether summary judgment will lie in a particular case.

3. Claimed Importance.

Laing finally contends that the instant case is of special public importance and therefore warrants the granting of certiorari.

The Vikings disagree.

The instant case simply involves the application of well settled case law on the subject of tying arrangements under the anti-trust statutes to a particular set of facts. Whether a genuine issue as to any material fact exists depends solely on the state of record before the District Court. No important question of federal law is involved. There is no reason of national importance why the Supreme Court should take jurisdiction by way of certiorari in order to determine whether this particular case was properly decided by the Court of Appeals.

CONCLUSION

In light of all of the foregoing, the Vikings submit that petitioner, Laing, has not made out a case for the granting of his petition for certiorari. Laing has not shown any special or important reason warranting the granting of certiorari.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

IRVING R. BRAND, ESQ.
1800 Midwest Plaza
Minneapolis, Minnesota 55402
Attorney for Respondent
Minnesota Vikings Football
Club, Inc.

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 74-129-Civ-CA

ELLIS S. RUBIN,

Plaintiff,

v.

MIAMI DOLPHINS, LTD.,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE has come before the Court on defendant's Motion for Summary Judgment. Upon consideration of the record in this cause and the Court being otherwise duly advised, it is ORDERED AND ADJUDGED that the motion is granted. The Court adopts the argument and case law set forth by the defendant in its memorandum in support of the motion for summary judgment.

DONE AND ORDERED at Miami, Florida this 22nd day of May, 1974.

C. CLYDE ATKINS
United States District Judge

cc. Paul & Thompson
Ellis S. Rubin, Esq.

SUPREME COURT, U. S.

FILED

SEP 6 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 73-1716

NORBERT A. LAING, an individual, on behalf of himself and all other persons, associations, firms and corporations similarly situated,

Petitioner,

vs.

MINNESOTA VIKINGS FOOTBALL CLUB, INC., John Doe, Richard Roe, et al., A.F.C., Inc., et al.,

Respondents.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Of Counsel:
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MINNESOTA VIKINGS FOOTBALL CLUB, INC., John Doe, Richard Roe, et al., A.B.C., Inc., et al.,

Respondents.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 24, Subdivision 5, of the Revised Rules of the Supreme Court of the United States, respondent Minnesota Vikings Football Club, Inc. calls to the attention of the Court the decision of the United States Court of Appeals for the Fifth Circuit in the case of *Driskill v. Dallas Cowboys Football Club, Inc., et al.*, No. 73-2659, rendered on August 9, 1974, a date subsequent to the filing of respondent's Brief in Opposition to Petition for Writ of Certiorari.

The decision of the Court of Appeals affirms the decision of the United States District Court for the Northern District of Texas granting summary judgment in favor of the football club, cited in respondent's main brief in the footnote on page 5 thereof.

A copy of the opinion of the Court of Appeals is set forth in the Appendix.

Respectfully submitted,

IRVING R. BRAND, ESQ.
1800 Midwest Plaza
Minneapolis, Minnesota 55402
Attorney for Respondent
Minnesota Vikings Football
Club, Inc.

APPENDIX

RICHARD E. DRISKILL, Plaintiff-Appellant,

v.

DALLAS COWBOYS FOOTBALL CLUB, INC., et al., Defendants-Appellees.

No. 73-2659.

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

Aug. 9, 1974.

Action was brought by an individual against a professional football club and a city in which it was alleged that the defendants had established an illegal tying arrangement requiring the purchase of preseason tickets and low-interest stadium bonds as a condition for the purchase of a season ticket package. The United States District Court for the Northern District of Texas, at Dallas, William M. Taylor, Jr., Chief Judge, entered summary judgment in favor of defendants, and plaintiff appealed. The Court of Appeals, Thornberry, Circuit Judge, held that summary judgment had been properly entered in view of the fact that plaintiff had not pleaded that the tying of season tickets to preseason tickets and stadium bonds had any anticompetitive effect and had not alleged with particularity and material facts in issue that would support a finding of anticompetitive effects or coercion to purchase the bonds.

Affirmed.

1. Monopolies

Characteristics of illegal tying arrangement are: (1) two separate products, the tying product and the tied product; (2)

sufficient economic power in tying market to coerce purchase of tied product; (3) involvement of not insubstantial amount of interstate commerce in tied market; and (4) anticompetitive effects in tied market. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

2. Federal Civil Procedure

For purpose of withstanding defendants' motion for summary judgment in antitrust action alleging illegal tying arrangement, existence of not insubstantial amount of interstate commerce in allegedly tied market of season professional football tickets was established by affidavit of president of football club indicating that season ticket holders had accounted for approximately one-half of seating capacity of club's stadium. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

3. Federal Civil Procedure

In action alleging that professional football club and city had established illegal tying arrangement by requiring purchase of preseason tickets and low-interest stadium bonds as condition for purchase of season ticket package, issues of separability of preseason and regular season ticket product markets and existence of sufficient market power to coerce purchase of tied product were triable issues of fact not subject to proper adjudication by summary judgment. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

4. Monopolies

Where professional football club had complete monopoly in allegedly tied market of preseason professional football games in city and there could thus be no adverse effect on any competitors caused by club's tying purchase of season tickets to purchase of preseason games, tying arrangement was not

illegal under Sherman Act. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

5. Monopolies

Act of professional football club and city in tying purchase of season football tickets to purchase of low interest stadium bonds did not constitute illegal tying arrangement in absence of exploitation of club's monopoly for purpose of coercing purchase of bonds, and anticompetitive effect in tied market for bonds.

Appeal from the United States District Court for the Northern District of Texas.

Before GEWIN, THORNBERRY and SIMPSON, Circuit Judges.

THORNBERRY, Circuit Judge:

Driskill brought this action under § 1 of the Sherman Anti-Trust Act, 15 U.S.C.A. § 1, alleging that the Cowboys and the City of Irving have established an illegal "tying" arrangement, requiring the purchase of undesirable items—preseason tickets and low-interest stadium bonds—as a condition for the purchase of the desirable item—the season ticket package, with its attendant preferential seating location, parking privileges, and right to reserve a season ticket and a particular seat for the following season. The district court granted summary judgment in favor of defendants, holding as follows: (1) since single game tickets have been available for every home game in the past, Driskill has not been coerced to buy preseason tickets in order to gain admission to the regular season games; (2) the granting of preferred parking to season ticket holders is a reasonable business practice with no anti-competitive effect; (3) since individual home game tickets have always

been available, Driskill has not been coerced to buy a stadium bond in order to gain admission to regular season games; and (4) forcing the purchase of a stadium bond or bonds as a prerequisite to the purchase of a season ticket package has no anticompetitive effect. We affirm on the ground that Driskill has not pleaded that the tying of season tickets to preseason tickets and stadium bonds has any anti-competitive effect, nor has he alleged with particularity any material facts in issue what would support a finding of anti-competitive effects or coercion to purchase the bonds so as to avoid an adverse summary judgment.

There has been a spate of cases alleging Sherman Act violations in the tying of preseason tickets to season tickets by various National Football League teams. These cases have all resulted in summary judgments for the defendant teams. *See* Pfeiffer v. New England Patriots Football Club, Inc., D. Mass. 1972, 1973 Trade Cas. ¶ 74,267, appeal dismissed, 1 Cir., Nov. 1, 1972, No. 72-1306; Laing v. Minnesota Vikings Football Club, Inc., D. Minn. 1973, 372 F.Supp. 59, aff'd, 8 Cir. 1974, 492 F.2d 1381, petition for cert. filed, 42 U.S.L.W. 3693, U.S., May 16, 1974; Coniglio v. Highwood Services, Inc. [Buffalo Bills], W.D.N.Y., 1973, 60 F.R.D. 359, aff'd, 2 Cir. 1974, 495 F.2d 1286; Grossman Development Co. v. Detroit Lions, Inc., E.D. Mich. 1973, 1973-2 Trade Cas. ¶ 74,790, appeal docketed, 6 Cir. 1974, No. 74-1093; Rubin v. Miami Dolphins, Ltd., S.D. Fla., May 22, 1974, No. 74-129-Civ-CA. Summary judgments have been granted or upheld on appeal on three different theories: (1) that fans are not in fact coerced into buying tickets to preseason games (as part of a season ticket package) in order to gain admission to regular season games; (2) that no tying of one product to another is possible, since there do not exist two different products—preseason and regular

season games—but rather only one indivisible product—professional football games; and (3) that the tying of preseason to regular season tickets has no anticompetitive effect in the tied market. We agree with the conclusion reached by the Second Circuit after a very careful analysis in *Coniglio*, that, although neither of the first two theories is sufficient to sustain the summary judgment here, the last provides a basis of affirmance. *See also* Grossman Development Co. v. Detroit Lions, Inc., *supra*.

[1] A tying agreement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product. . . ." Northern Pacific Ry. v. United States, 1958, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545. Tying agreements violate the Sherman Act whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of interstate commerce is affected. Id. at 6, 78 S.Ct. at 518. Thus there are four characteristics of an illegal tying arrangement:

(1) two separate products, the tying product and the tied product;

(2) sufficient economic power in the tying market to coerce purchase of the tied product;

(3) involvement of a not insubstantial amount of interstate commerce in the tied market; and

(4) anticompetitive effects in the tied market.

Coniglio v. Highwood Services, Inc., 2 Cir. 1974, 495 F.2d at 1289.

[2-4] It seems clear here, as in *Coniglio*, that a not insubstantial amount of interstate commerce in the tied market is involved, since, according to the affidavit of Texas E. Schramm, President of the Cowboys, season ticket holders

have accounted for approximately one-half of the seating capacity of the stadium. Similarly, we agree with the *Coniglio* court that the issues of separability of the preseason and regular season ticket product markets and existence of sufficient market power to coerce purchase of the tied product are triable issues of fact not subject to proper adjudication by summary judgment. As in *Coniglio*, however, the Cowboys have a complete monopoly in the tied market—preseason professional football games in Dallas—and there can thus be no adverse effect on any competitors, even if a tying scheme exists. There being no anticompetitive effect in the tied market, the fourth requirement for a Sherman Act tying scheme is not met, and the portion of Driskills' suit dealing with preseason game tickets was properly dismissed on summary judgment for the defendants.

[5] This suit presents a claim not present in any of the other litigation, however. Driskill alleges the tying of undesirable low-interest stadium bonds to the desirable season ticket package, while all the other suits presented only the issue of tying preseason game tickets to those for the regular season games. This claim quite clearly involves two different products—long-term bonds and football tickets—and the Cowboys concededly have a complete monopoly over the latter, which is the tying product. However, even assuming that Schramm's affidavit establishes that a not insubstantial amount of commerce is involved, since each of the season ticket holders must buy one or more stadium bonds which cost $250 each, Driskill failed to forestall summary judgment on this part of his claim by failing to assert specific facts tending to show either exploitation of their monopoly by the Cowboys to coerce the purchase of the bonds or any anticompetitive effect in the tied market for long-term bonds. Since Driskill

failed to come forth with a showing of any specific facts supporting his position with regard to either coercion or anticompetitive effects, the summary judgment against him was proper.

Affirmed.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1716

NORBERT A. LAING, an individual, on behalf of himself and all other persons, associations, firms and corporations similarly situated,

Petitioner,

vs.

MINNESOTA VIKINGS FOOTBALL CLUB, INC. John Doe, Richard Roe, et al., A.B.C., Inc., et al.,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Petition herein was filed May 16, 1974.

This supplemental Brief is filed by Petitioner, Norbert A. Laing, under paragraph number 5 of Rule 24 of the Rules of the Supreme Court of the United States. The attention of this Court is respectfully called to the new opinion by the Honorable W. T. Sweigert, United States District Judge for the Northern District of California, rendered July 8, 1974 in the football ticket-tying case of *Lawrence Flood v. San Francisco Forty-Niners.* Judge Sweigert denied the Forty-Niners' motion for summary judgment and in so doing apparently endorsed the relevant market argument of Petitioner herein that

it is not essential that the competitive market be limited to the identical tied product. See A-7 herein.

The Vikings' Supplemental Brief herein drew attention to the new opinion by the Fifth Circuit in the Dallas Cowboys' ticket-tying case where that Court purported to follow the Second Circuit in the Buffalo Bills ticket-tying case of *Coniglio v. Highwood Services*, cited in the Petition herein at page 7. However, the Fifth Circuit failed to note the important statement by the Second Circuit that the Buffalo ticket holder's argument was of "extraordinary breadth" so as to include everything "from a trip to the zoo to a night at the opera,". See the Petition herein at page 7.

Further attention is drawn by Petitioner to the Vikings' Supplemental Brief, page A-4, where the Fifth Circuit noted a "spate of cases" and said all had resulted in summary judgment for the defendant football teams. For some reason the decision by Judge Sweigert was not cited although it had been submitted by the ticket holder's counsel.

A copy of Judge Sweigert's opinion denying summary judgment to the Forty-Niners is printed in the Appendix herein.

Respectfully submitted,

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Of Counsel:
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By JOSEPH T. BURKARD
854 Midland Bank Building
Minneapolis, Minnesota 55401

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 72 1704 WTS

LAWRENCE FLOOD,

Plaintiff,

vs.

SAN FRANCISCO FORTY-NINERS,
a limited partnership,

Defendant.

MEMORANDUM OF DECISION

SWEIGERT, District Judge.

This is a class action brought on behalf of season ticket holders for San Francisco Forty-Niner home football games. Plaintiff alleges in substance and effect that the sale of season tickets, packaging pre-season game tickets with regular game tickets, is a "tying arrangement," (the "tied product" being tickets to pre-season games and the "tying product" being tickets to regular season games) in violation of the anti-trust laws, 15 U.S.C. Sec. 1, as interpreted by the courts in the cases hereinafter cited. Plaintiff seeks a decree of this court so declaring and recovery of treble damages as provided by law.

The case is now before the court on defendant's motion for a summary judgment in its favor upon the ground that the record does not present requisite genuine issues of material fact to establish an illegal anti-trust tying arrangement.

The record consists of affidavits, counter affidavits and Court's Exhibits A and B hereinafter further mentioned.

A tying arrangement is one whereby a seller agrees to sell one product, (the tying product) on condition that the buyer also purchase a different (or tied) product. To constitute the kind of tying arrangement held by the courts to be in violation of the anti-trust laws it must appear that there has been a coercive requirement that the sale of one product (the tying product) over which the supplier enjoys a unique control, has been conditioned upon the purchase of a different product (the tied product), in such a way that the purchaser is in effect deprived of the freedom to acquire from some other suppliers a product comparable with the tied product and those suppliers are in effect deprived of access to the market for their competitive product.

It has been said that the vice of such tying arrangements is that they obstruct purchasers' and competitors' free access to the market of the tied product—not because the party imposing the tying requirement has a better product or a lower price, but because of his power or leverage in the market of the tying product. *I.B.M. v. United States*, 298 U.S. 36 (1936); *International Salt v. United States*, 298 U.S. 36 (1936); *International Salt v. United States*, 332 U.S. 392 (1947); *Paramount v. United States*, 334 U.S. 131 (1948); *Times-Picayune v. United States*, 345 U.S. 594 (1953); *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958); *United States v. Loews*, 371 U.S. 39 (1962); *Fortner v. U.S. Steel*, 394 U.S. 495 (1969); *Siegel v. Chicken Delight*, 448 F.2d 43 (9th Cir. 1971).

These cases hold that such tie-ins are unreasonable per se whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free interstate commerce competition in the market for the tied product.

THE FACTS

The facts in the pending case are substantially as follows: The parties agree that a "season ticket," sometimes called an "all inclusive ticket," consists of a package of tickets entitling the holder to reserved seat admission to every Forty-Niner home game, both pre-season and regular, guaranteeing the holder the same seat for each game and, further, an option to renew his purchase of a season ticket for the following season at the same seat or better.

During the last four years, 1970-1973, these season tickets have been customarily sold from February until the August date of the first home pre-season game. During that period the Forty-Niner management would not sell tickets for regular season games unless coupled in a season ticket package with pre-season games; requests for regular season game tickets only (or for tickets for single or specified games) were received only as "orders" subject, of course, to availability of seats remaining after the first pre-season game. After that game, these orders would be filled on a priority basis—the earliest dated order being filled first. Forty-Niner management also customarily set aside 2,000 unreserved seats for general admission ticket sale about ten days prior to each game.

In the year 1970, out of a total seating capacity of 60,000 (Kezar Stadium), 20,000 of these season tickets, entitling the holder to one pre-season and all regular home games, had been sold by the first pre-season game, leaving 38,000 reserved seats available to fill orders for regular season games only—along with the 2,000 general admission seats.

In 1971, out of a total capacity of 46,000 (Candlestick Park partially completed), 38,712 of these season tickets, entitling the holders to two pre-season and all regular home games, had

been sold by the first pre-season game, leaving 5,288 reserved seats available—along with the general admission seats.

In 1972, out of a total capacity of 61,000 (Candlestick Park completed), 53,483 of these season tickets, entitling the holders to three pre-season and all regular home games, had been sold by the first pre-season game, leaving only 5,483 reserved seats available. But, by August 4, 1972, with all the home games yet to be played, all reserved seats had been sold for all games; Forty-Niner management then announced that the 2,000 general admission seats, which had previously been kept for sale just before each game, would be made immediately available for sale on a reserved seat basis—but without the renewal privilege.

In the year 1973[1] an unprecedented demand for renewal of tickets by holders of reserved seat season tickets for the previous year was such that as early as May 11, 1973, all reserved seats for all Forty-Niner 1973 games had been sold out. Forty-Niner management announced that, because of this sell-out, the 2,000 general admission seats would again be made available on a reserved seat basis—but without the renewal privilege.

Plaintiffs' Contentions

Plaintiffs contend that this advance season ticket sale practice, coupling pre-season game tickets with regular game tickets in a single season ticket package, is an unlawful tying arrangement which in effect deprives Forty-Niner ticket purchasers of the opportunity to purchase season tickets for regular season games—except upon the coercive condition of also purchasing tickets for pre-season games which, plaintiffs con-

[1] By its recent order the court permitted plaintiff to file a supplemental complaint putting in issue ticket sale practice for the year 1973 as well as for the years 1970, 1971 and 1972 to which the original complaint was limited.

tend, are mere exhibition games, different from, inferior to and less desirable than regular season games and, therefore, unwanted; further, that such ticket practice anti-competitively affects the market for tickets to other professional football events and tickets to other forms of sport, recreation and entertainment.

Other Cases

The question of the legality of this ticket practice has been presented in six other districts and to two Circuit Courts of Appeal; in each case thus far the ruling has been summarily in favor of the football club defendants—mainly upon the ground that it appeared in those cases that, since ample tickets for regular season games always remained available over and beyond the advance sale of packaged regular game-pre-season game tickets, there was really no coercive requirement for the purchase of pre-season game tickets. See, e.g., *Pfeiffer v. New England Patriots* (D.Mass. No. 71-2501, 7/25/73); *Laing v. Minnesota Vikings*, 372 F.Supp. 59 (D.Minn. (1973), (aff'd 492 F.2d 1381 (8th Cir. 1974); *Driskill v. Dallas Cowboys* (N.D. Texas, No. CA-3-6313-D, 6/1/73); *Coniglio v. National Football League* (Buffalo Bills) (W.D.N.Y. No. 1970-408, 7/30/73), (aff'd 2d Circuit, No. 73-2448, 4/22/74).

One case based its ruling on the ground that as a matter of law, pre-season football games are not "different products" from regular season games within the meaning of the tying doctrine. *Pfeiffer v. New England Patriots*, supra. See also, *Shayne v. Madison Square Garden* (E.D.N.Y. No. 72-22, 1/9/73). Some of these courts have based their rulings on the ground that there was no showing in their cases of an anti-competitive effect on the tied product market. (See, e.g., *Grossman Development Co. v. Detroit Lions, Inc.* (E.D. Mich. No. CA 37652, 11/16/73; *Coniglio v. NFL* (Buffalo Bills),

(2d Cir. No. 73 2448, 4/17/74); *Laing v. Minnesota Vikings*, 492 F.2d 1381 (8th Cir. 1974).

Re "Interstate" Character Of Any Affected Commerce

Although the point has not been raised by either side, we should first consider the basic question whether any involved commerce is interstate in character.

Plaintiffs' allegations concerning the *interstate* character of the commerce allegedly affected by defendants' ticket sales practice (Complaint Par. 7(a)(d)) are to the effect that defendant is a member of the National Football League, composed of defendant and similar football clubs in other major cities of California and other states; that defendants' team plays these other teams in California and other states on a regular weekly basis during the regular league season and sometimes in exhibition games during the pre-season; that these teams necessarily travel in interstate commerce and share in the game ticket sales receipts; that defendant, other teams and the NFL have entered into lucrative contracts for the interstate broadcast of these games by television and radio.

These allegations are in all significant substance admitted by defendant (Answer Par. 7(a)-(d)). Although arguing that its ticket practices do not interfere with any competition, defendant has not questioned in its briefs the *interstate* character of any such commerce as might be held by the court to be affected.

In *Grossman v. Detroit Lions*, supra, the court considering issues identical with the pending case, rejected a Detroit Lions' contention that any affected commerce would not be of interstate character. None of the courts that have thus far considered these NFL or AFL football league ticket practices have ever raised a question concerning the interstate character of any commerce that might be affected.

On the record before us, we are of the opinion that, assuming all other elements of an anti-trust tie-in exist, the defendants' ticket practices would, not only affect "interstate" commerce but would also occur within the stream of such "interstate" commerce within the meaning of such cases as *Radovich v. NFL*, 352 U.S. 445 (1957) and *United States v. Int. Boxing Club*, 348 U.S. 236, 241 (1955).

Effect Of Defendants' Ticket Practice On Identifiable Potential Competition

Since the rationale of the anti-trust tie-in doctrine is that the tie-in practice has anti-competitive effects, the question arises whether such an anti-competitive effect of defendants' ticket practice is shown in the present record.

Defendant contends that, since the very nature of things there could be no other supplier of tickets for Forty-Niner home football games, there can be no conceivable anti-competitive effect. This argument, however, is too narrowly drawn. It is not essential that the competitive market be limited to the *identical* tied product. Indeed, to so hold would virtually abolish the tie-in doctrine. It is enough that there be an obstruction to a market, present or potential, in products or events fairly comparable to the tied product or event in terms of competition.

Plaintiff next broadly contends that the competitive market need not be narrowly drawn to include only professional football games but should include the ticket market for other reasonably comparable sport, recreational or entertainment events which might be anti-competitively affected by defendants' tie-in ticket practice.

It is not necessary, however, to pass upon the question whether and, if so, how far the relevant market of competition should be extended beyond professional football because

the record in the pending case sufficiently shows competition even within that narrow field of professional football, i.e., competition with the nearby Oakland Raiders.

Until recently the only reference in the record to possible professional football competition from the Oakland Raiders appeared in plaintiff's affidavit of Flood, filed April 3, 1973, wherein the affiant, disparaging pre-season games, states that he would prefer on pre-season Sundays to spend $7.50 on going to a racetrack "or even watching the Raiders, who I otherwise would not get to observe except on television."

Recently, the court requested both sides to supplement the evidentiary record with greater detail on this suggestion of possible Oakland Raider competition. Accordingly, defendant filed a supplementary affidavit of Spadia (5/17/74) to the effect that the San Francisco Forty-Niners, who play their games at Candlestick Park and the Oakland Raiders, who play their home games at nearby Oakland Coliseum, are the only professional football teams in northern California, the closest other such team being in Los Angeles, California; that the Oakland Raiders have never, during the years 1970 through 1973, played a game in the San Francisco Bay Area "on a date when" the Forty-Niners were playing a pre-season game in San Francisco or in the Bay Area.

However, the Spadia affidavit sets forth the pre-season home game schedules for the Forty-Niners and the transbay Oakland Raiders, respectively, during the four year period, 1970, 1971, 1972 and 1973. This schedule discloses that, although pre-season games staged by the two teams have not been played on exactly the same "date," there has been a clearly established pattern of pre-season home games being played by the respective teams just one day apart (6 instances), less than one week apart (4 instances) and less than two weeks apart (4 instances).

To amount to competition between the Forty-Niners and the Oakland Raiders for the football fans' $7.50, it is not necessary that their games be played on the very same day; it is sufficient if the games are scheduled close enough together in time and space to reasonably call for a decision by the fan concerning which of several closely scheduled games will receive what may well be the only $7.50 the fan may want to spend for professional football during the limited period.[2]

We are satisfied, therefore, that (unlike the records in *Grossman v. Detroit Lions*, supra; *Laing v. Minnesota Vikings*, supra, and *Coniglio v. NFL-Buffalo Bills)*[3] the record in our pending case sufficiently presents the competitive effect issue. Further, such competition would be substantial since it appears that a Candlestick Park stadium reserved seat capacity of 59,000 at $7.50 per seat for three pre-season games each year could produce a potential sale of Forty-Niner pre-season game tickets amounting to an annual gross of $1.2 million—hardly an insubstantial amount of anti-competitive involvement—especially in the light of comparable, competitive gross pre-season game ticket sales by the Oakland Raiders.

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[2] Speaking of Forty-Niner - Oakland Raider pre-season game competition, it can be noted that another lawsuit (Kerner v. Oakland Raiders, No. C-72-2914 - WTS) involving the identical ticket practice herein alleged, has been brought in this court by a different plaintiff against the Oakland Raiders.

[3] In *Grossman v. Detroit Lions*, supra, it was "admitted that defendant (the Detroit Lions) has no present or identifiable potential competitor in the market of professional football." In *Laing v. Minnesota Vikings*, 492 F.2d 138 (8th Cir. 2/11/73), the court (affirming the trial court's sole ground of decision) (no coercive requirement) added, citing Grossman, supra, the further ground (left undecided by the trial court) that "plaintiff has demonstrated no anti-competitive effect." (p. 1381). In *Coniglio* (2d Cir. No. 73 2448, 4/17/74), the court, citing both Grossman and Laing, said it was "undisputed that there was neither actual nor potential competitors to The Bills (The Buffalo Bills) in the professional football market." (p. 2920, slip opinion).

Re Different Products

Defendant contends that there is no tie-in arrangement here because, as a matter of law, pre-season games, the alleged tied product, are no different than regular season games; that all its football games are, indistinguishably, merely professional football games—regardless whether played in regular or in pre-season. On the other hand, plaintiff contends that pre-season games are obviously different from, inferior to and less desirable than regular season games and, therefore, a "different product" within the meaning of the anti-trust tie-in doctrine.

In this connection one should bear in mind that the primary purpose of NFL is to present football games in which its member teams engage in regular season contests that count for division, league and bowl championships. As a matter of common knowledge the pre-season period has been previously regarded in football, and still is regarded in baseball and other professional sports, as the try-out, conditioning, training or practice period necessary to assemble and test for the ultimate product—the regular season team. Although there is nothing wrong with having pre-season games and selling tickets for them, it is something else to tie in such pre-season game tickets with regular season game tickets. This seems to be much like tying in tickets for rehearsals with repertory theatre tickets or movie tickets—or like tying in tickets for the training camp bouts with prize fight tickets.

In *United States v. Loews*, 371 U.S. 38 (1962) the Supreme Court held that there was an anti-trust tie-in violation when distributors of copyrighted feature motion picture films engaged in block booking films to TV stations, i.e., conditioning the sale of exhibition rights to one or more feature films upon acceptance by the purchaser station of a package of films

containing one or more unwanted or inferior films. The court found no trouble in impliedly holding that the various feature films, although similar in that they were all designed for motion picture entertainment, were each a different product from the other insofar as some were less desirable than others and unwanted by exhibitors. It is much easier to recognize a difference between regular league football games and pre-season practice games.

In *Coniglio*, supra, the 2d Circuit, although ruling for defendant in the no competition issue, rejected defendants' (Buffalo Bills) contention that the difference between pre-season and regular season games was insufficient to present the different product issue.[4]

Without detailing alleged points of difference between pre-season and regular season games, as described in plaintiffs' affidavits, and alleged similarities, as described in defendants' affidavits, we are of the opinion that the evidentiary record herein is sufficient to present the "different products" issue, i.e., whether pre-season games are sufficiently different in their history, their purpose and their nature from regular league competition games to justify an ordinary purchaser's conclusion that the former are different from and less desirable than the latter and for that reason unwanted.[5]

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[4] In *Pfeiffer v. New Engand Patriots*, supra, the court, after expressly recognizing an "obvious distinction" between pre-season games and regular games, strangely proceeded to say that a subdivision of the market on the basis of such an "obvious" distinction would be "untenable."

[5] Conceivably, it could be contended, citing *Loews* and similar cases, that, since there is an arguable difference in sport attractiveness and fan desirability even between regular season games, an advance season ticket practice, requiring a customer to purchase season tickets for all *regular* games (necessarily including some regular games which might be considered by the purchaser to be inferior and unwanted) would involve "different products" and an anti-trust tie-in.

We have in mind that any such extension of the tie-in doctrine might be used to call into question the common practice of opera,

The Coercion Issue

Defendant at first contended that it did not require purchasers of tickets for Forty-Niner regular game tickets to also purchase tickets for its pre-season games. However, in response to request by the court for clarification of the evidentiary record, defendant has admitted that its season tickets have been customarily sold from February until the summer (August) date of the first home pre-season game and that during that period Forty-Niner management would not sell tickets for regular season games unless coupled in a season ticket package with tickets for the pre-season games; that orders made during that period for regular game tickets only (or for single or specified games only) would not be filled but would be set aside as orders to be filled subject to availability of seats after the first pre-season game. Only after that game would such orders be filled. (See, Court's Exhibits A and B—an exchange of letters between counsel and court in response to court's request for clarification of the evidentiary record, i.e., letter from plaintiff's counsel to defendant's counsel, dated May 21, 1973 (Ex. A) and letter from defendant's counsel to plaintiff's counsel, dated May 25, 1973 (Ex. B) both herein for identification).

Plaintiff argues that, under this practice, although some fans may want the whole package, it is also reasonable to expect that others, anxious to avoid an indicated sellout during

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symphony, repertory theatre companies and similar organizations to present a series of selected operas, concerts, plays or events and to withhold general sale of single or specified event tickets pending a season ticket package sale (generally offered to a special list of sponsors). As already noted, however, plaintiff in the pending case does not go so far as to challenge advance season ticket sales for *all regular* games; he limits his challenge to the tie-in of an allegedly different product, i.e., pre-season games, and our ruling in the pending case, being similarly limited, does not imply invalidity of the season ticket practice described in this note.

that advance season ticket sale period, are constrained to buy the package even though it includes pre-season games which they consider different, inferior and, therefore, unwanted.

We are of the opinion that this kind of advance season ticket practice sufficiently presents an issue of coercion especially when (as nearly happened in 1971 and as actually happened in 1972 and 1973) all or virtually all reserved seats were sold out during the season ticket sale period.

In this respect, the pending case is to be distinguished from previous cases which have ruled that there was no coercion when ample regular game tickets always remained available notwithstanding the advance sale of the pre-season-regular game package (e.g., *Pfeiffer*, *Laing*, *Driskill* and *Coniglio*, supra). The implication of these cases, insofar as they stress the availability of remaining regular game tickets, is that, if no such tickets remained, there would be a coercive tie-in within the meaning of the tie-in doctrine.[6]

Conclusion

For the foregoing reasons we conclude that plaintiff, contending that defendant's advance season ticket practice, insofar as it includes a requirement for purchase of pre-season game tickets, is an antitrust tie-in within the meaning of the law, have made a sufficient showing of genuine issues of material fact to preclude summary judgment for defendant. To hold otherwise as a matter of law, would in our opinion, encourage a device by which sellers can utilize their unique control over a desirable event to coerce the public into also purchasing tick-

[6] Indeed, in *Laing*, 8th Circuit, Judge Lay, concurring, refused to affirm the trial court's no coercion ruling—even though regular season tickets remained available; also in *Coniglio* the 2d Circuit rejected the trial court's holding of no coercion—even though there was no showing (as there is here) of a complete sellout during the package season ticket sale.

ets [illegible] different, tied-in products or events which can reasonably be regarded by the public as inferior, undesirable and unwanted.

Defendants' motion for a summary judgment in its favor, is, therefore, denied, but further proceedings will be necessary before a final judgment herein.[7]

Dated: July 8th, 1974.

W. T. SWEIGERT
United States District Judge

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[7] Although neither party has yet moved for a determination whether, and, if so, to what extent, the named plaintiff can maintain this action as a class action, it would seem that, since plaintiff does not challenge defendants' season ticket practice—*except* only insofar as it includes pre-season games in the package—plaintiff's representation would have to be narrowly limited to season ticket holders in that identical class.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1716

NORBERT A. LAING, an individual, on behalf of himself and all other persons, associations, firms and corporations similarly situated,

Petitioner,

vs.

MINNESOTA VIKINGS FOOTBALL CLUB, INC., John Doe, Richard Roe, et al., A.B.C., Inc., et al.,

Respondents.

SUPPLEMENTAL BRIEF NUMBER TWO IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This Supplemental Brief Number Two In Support Of Petition For Certiorari is filed to bring to the attention of this Court the decision of the Sixth Circuit in *Grossman Development Co. v. Detroit Lions*, decided September 5, 1974. (Appendix herein).

The Sixth Circuit in *Grossman* cited both *Coniglio* and *Laing* yet in the footnote distinguishing *Flood v. San Francisco Forty-Niners*, spoke in terms of "*recreation*" (emphasis added) dollars of football fans. Such language supports Laing's affidavit in the Record herein that his dollars are attracted by other teams competing with the Vikings in the immediate geographic market such as the Minnesota North Stars (professional

hockey), Minnesota Twins (professional baseball), Minnesota Fighting Saints (professional hockey), and the Minnesota Gophers (Big Ten College football).

Petitioner is summarily out of Court on the competitive effect issue which was expressly *not* considered by the District Court herein (Petition, at A-6), yet Petitioner, of all the ticket cases, best met that issue with facts in the record.

Every Circuit Court, and the Northern District of California, considering the football ticket-tying cases has ruled in conflict with the Circuit Court and the District Court herein on the question of availability of tickets, i.e., "consumer compulsion".

The Second Circuit, and the Northern District of California, apparently conflict with the narrow relevant product market decisions of the Eighth, Sixth, and Seventh Circuits, in *Laing*, *Grossman*, and *Driskill*, respectively.

None of the Courts expressly considered the summary judgment criteria for antitrust actions as set out by this Court and instead the sports fan is summarily dismissed.

By summary disposition all the Courts appear in conflict with the relevant market showing allowed by this Court in *International Boxing Club v. U. S.*, 358 U.S. 242, 250-251, as cited in the Petition herein at pages 13 and 14.

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION

No. 74-1093

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GROSSMAN DEVELOPMENT CO., on behalf of itself and all other persons similarly situated,
Plaintiff-Appellant,

v.

DETROIT LIONS, INC.,
Defendant-Appellee.

APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed September 5, 1974.

Before: CELEBREZZE, LIVELY and ENGEL, Circuit Judges.

PER CURIAM. The plaintiff, a holder of eight season tickets to the football games of the Detroit Lions, brought this class action. It is alleged that the practice of requiring persons who desire season tickets which entitle them to a designated seat at all regular season games to also purchase tickets for the same seat at two or three pre-season exhibition games constitutes a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The district court granted summary judgment to the defendant on the ground that —

> Because there is no allegation that competition is injured or affected by the LIONS' season ticket policy, there is no violation of Section 1 of the Sherman Act.

There is no dispute that at the time the complaint was filed the Lions had an effective monopoly in professional football with respect to exhibition games as well as regular season games in the Detroit area. Where the seller has a natural monopoly in both the "tying" (regular season tickets) and the "tied" (exhibition games tickets) products, the tie-in does not constitute a *per se* violation of the Sherman Act. *Coniglio* v. *Highwood Services, Inc., et al.*, —— F.2d ——, No. 73-2448 (2d Cir. April 17, 1974); *Laing* v. *Minnesota Vikings Football Club, Inc.*, 492 F.2d 1381 (8th Cir. 1974).[1]

After this case had been submitted to the district court for decision on the motion for summary judgment, plaintiff tendered an amended complaint alleging a violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. Noting that the plaintiffs "expressly stated that they do not intend to show that there is any competitor actually affected by defendant's monopoly power . . . " or that "any specific potential competitor is affected," the court denied the motion to amend. We find no abuse of discretion in this ruling.

The judgment of the district court is affirmed for the reasons set forth in the opinion of District Judge Cornelia G. Kennedy.

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[1] After submission of this case appellant cited to the court the decision in *Flood v. San Francisco Forty-Niners*, No. C 72 1704, decided by the United States District Court for the Northern District of California on July 9, 1974. That case is readily distinguishable from the present one because of the finding that the Oakland Raiders provide competition in the Bay Area for the recreation dollars of football fans.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1716

NORBERT A. LAING, an individual, on behalf of himself and all other persons, associations, firms and corporations similarly situated,

Petitioner,

vs.

MINNESOTA VIKINGS FOOTBALL CLUB, INC. John Doe, Richard Roe, et al., A.B.C., Inc., et al.,

Respondents.

SUPPLEMENTAL BRIEF NUMBER THREE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This Supplemental Brief Number Three In Support of the Petition For Certiorari is filed pursuant to Supreme Court Rule 24, paragraph 5 to call the attention of this Court to other intervening matter not available at the time of Petitioner's last filing.

On Wednesday, September 18, 1974, the Minneapolis Star printed a story on "Mr. 'M': Paul Giel", the Athletic Director of the University of Minnesota. A portion of said newspaper story is directly relevant to the competitive effect issue herein. That portion of the story is reprinted hereinafter for convenience of attention and the entire story is reprinted in the Appendix hereto.

> "He has no doubts that the principal competition he is facing is professional sports as represented by the Vikings, North Stars, Fighting Saints and Twins.
>
> 'Do you realize the pressure on us in the backyard of the pros? Look at Purdue, they pack 'em in, 55,000 a game. It's the only show in town.' "

The competitive sports cited by Mr. Giel are *exactly* those listed by Petitioner. The Affidavit by John E. Thomas, one of Petitioner's counsel herein, in the Record before the District Court and in the Appendix before the Eighth Circuit, cited evidence of such competition and especially *football* competition between the Vikings and the Minnesota Gophers.

It is respectfully submitted that Petitioner has shown enough for outright reversal, but at the very least, sufficient grounds for remand under 28 U.S.C. section 2106 especially on the very important antitrust question of definition of the relevant competitive products market.

Respectfully submitted,

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APPENDIX

THE MINNEAPOLIS STAR
Wednesday, September 18, 1974

Mr. M: Paul Giel

By PETER VAUGHAN
Minneapolis Star Staff Writer

Optimism is Paul Giel's stock in trade.

He was hoping not to see an empty seat at Saturday's University of Minnesota-Ohio State football game.

But the 41-year-old university athletic director is also a realist. Two days before the game, he knew there would be a lot of empty seats.

He sat beind a cluttered desk in his comfortable office in the Bierman Athletic Field Building and earnestly explained his immediate and future hopes for the department he inherited nearly three years ago when it was in a financially troubled and dispirited state.

"Sure, we will need good luck to get to 50,000 Saturday," he said. "I am a little disappointed. I would have liked to have packed them in for Ohio State. But it makes a difference with no students here yet."

Giel was right. The game, played in nearly perfect football weather, drew 45,000 persons to old Memorial Stadium, which has a capacity of 57,000.

Yet Giel doesn't dwell on the present shortcomings; he looks to the future:

"I am really looking forward to the day when I get calls the day before a game asking for tickets. When they say, 'I don't care if the seats are in the bowl end, just get me in,' then I will know I have done a job."

A slight edge of bitterness etched his words as he continued:

"I would like to be able to turn that guy down, tell him there weren't any tickets and ask him, 'where were you three years ago when we needed you?'"

When Giel took the job, he found himself looking at a $400,000 deficit and the virtual certainty that the deficit would climb for at least the next two years.

"I think I was realistic about what I was facing but I didn't know the magnitude of it. It wasn't just football, a big sport, or basketball, a big sport, but 11 sports, coaches, the news media, the Big Ten, the NCAA, image-building and public relations," he said.

"At the end of the first day (as athletic director), I would have done just about anything to get out of it. I had visited with (athletic director) Marsh Ryman. He was not bitter but he was disappointed.

"I talked to Glenn Reed (assistant athletic director). He was the heir apparent and my contemporary at the university. Here were two people who had given their lives to the school. They were heartbroken and I was trying to find out what the problems were.

"I took a wrong turn on the way home and got lost, it was so bad," Giel said.

While Giel had his initial fears, those around him were impressed only by his enthusiasm.

"I think he has been tremendous from the first day he came in here," said Dick Siebert, the baseball coach.

"He took charge. Everyone knew he was going to be the boss. He has far surpassed my wildest dreams," he said.

One of Giel's assets in the eyes of his coaches is that he is willing to give the golf team as much attention as the football team.

"Paul is a fellow you can sit down and talk to anytime you want. He has just as much time for the baseball coach or track coach as he does for the football coach," Siebert said.

Giel talks with open pride of hockey coach Herb Brooks and his 1974 NCAA championship team. One of the first things Giel did after Brooks was hired was to authorize the granting of six full hockey scholarships rather than the four that had been approved under the previous administration.

While Giel has not returned the athletic department to the black in his nearly three years at the helm, he added only $20,000 to the department's deficit this year, compared to the $400,000 that was added during his first two years.

The football team isn't playing to full houses but average attendance climbed from 37,000 in 1972 to 42,000 in 1973.

Giel has a good idea of where he wants to go:

"I want very badly to have a total program in 11 sports. I don't believe you can justify intercollegiate athletics on the basis of gate receipts.

"We must somehow maintain a total program and a winning program. I want to win within the rules and with good people that young men can identify with.

"I would like to flip a coin and have a chance in football with Michigan, Ohio State and Nebraska. I would like to go to the Rose Bowl. I would like to take on a North Carolina State or a UCLA in basketball. We have had that with Minnesota youngsters in hockey," Giel said.

He has no doubts that the principal competition he is facing is professional sports as represented by the Vikings, North Stars, Fighting Saints and Twins.

"Do you realize the pressure on us in the backyard of the pros? Look at Purdue, they pack 'em in, 55,000 a game. It's the only show in town."

When Giel arrived he found not only a divided department but also a public attitude toward the Golden Gophers that bordered on apathy.

Most observers say Giel's presence has cured the first problem. His answer to the second was a massive effort to create a new image for university teams, particularly the football squad.

Giel is forever on the go, speaking two times a day at least two days a week to groups almost anywhere in the state. He tries to build support for his athletic program and seeks donors for the Williams Memorial Fund, which not only provides scholarships for athletes but also pumps additional money into the department.

In 1974 the fund was given $243,000, of which about $90,000 went to scholarships, Giel said.

The remainder went to what Giel calls "discretionary" expenses, including a plane trip rather than a car ride to a tournament for the golf team, five days at an Alexandria resort for the football squad and a new batting cage for Siebert's baseball team.

Giel admits that the effort he puts into the job causes a little strain on his family life, especially during football season.

Giel's wife, Nancy, says she knew the season had arrived last week when her husband woke up at 3 a.m. and mumbled something about Ohio State.

However, Mrs. Giel thinks that her husband's schedule is

at least more convenient than his hours at WCCO radio, where he was sports director and had to broadcast at 7 a.m. and 10:30 p.m. six days a week. And they look forward to family skiing trips in the winter.

There is no doubt Giel has virtually every segment of the university behind him in his effort to turn the university's athletic programs around.

"I think he has done a remarkable job," said E. W. Ziebarth, who was acting president during part of Giel's term as athletic director.

"He has been a remarkable success. I know of no one on the national scene who could have done it with as much grace as Paul," he said.

Prof. Merle Loken, the university's Big Ten faculty representative, said, "The reason I took on the job of faculty representative is because of my respect for Mr. Giel. He is doing a tremendous job for the athletic programs at the 'U'."

One is hard pressed to find any detractors.

As Giel's friend Harvey MacKay put it, "About the only criticism you will hear about Paul is that he is too nice a guy."

In many observers' eyes, Giel has been an asset for the university since his first day on the campus in 1950, when he was a baby-faced freshman from Winona with a formidable reputation as a football halfback and baseball pitcher.

As a sophomore, Giel slipped on jersey No. 10 and quickly established himself as the first-string tailback in Minnesota's single-wing offense.

MacKay, an active member of the university's (alumni) M Club, remembers Giel well:

"He was shy and sincere as hell. He was always completely dedicated to whatever he was going to do. He was a ferocious competitor."

When Giel attended the university, Siebert was, as he is now, the university baseball coach.

He says Giel singlehandedly turned the baseball program from a mediocrity to the university's most successful intercollegiate athletic program.

"From the first time Paul Giel walked on the baseball field, our baseball fortunes started to climb," Siebert said.

Giel received All-America honors in football and in his senior year narrowly missed winning college football's highest individual honor, the Heisman Trophy.

After his college years, which he remembers as filled with "the golden-boy business," Giel became a "bonus baby" with the New York (baseball) Giants. It was 1954 and Giel, as the rules required, stayed with the major league club, sitting on the bench while his teammates won the National League pennant.

The next year he pitched sporadically for the Giants and compiled a 4-and-4 record before leaving for a two-year hitch with the Army in Germany.

When he returned from the Army for the 1958 season, the Giants were in San Francisco and Giel found the two-year layoff from big-league competition had dulled his talent.

"I didn't have quite enough major league ability. I didn't have a real good, major-league fastball so it was either triple-A ball or being the 10th man on a 10-man staff in the majors," he recalls.

So Giel began what his wife remembers as "our nomad days."

They shuffled from San Francisco to Phoenix to Pittsburgh, to Columbus and Salt Lake City, finally winding up in the Twin Cities in 1961 as the property of the Minnesota Twins, embarking on their first season in Minnesota.

Paul, however, began to have increasing doubts about his ability to make it in the big leagues.

"I thought there has to be something else. The whole situation had been eating me up," he said.

So when the Twins traded him to Kansas City in June 1961, he pitched in one game and then said good-by to baseball.

Giel went back to football as an assistant business manager for the new Minnesota Vikings.

After two years, Giel's career took another turn when he received a call from Larry Haeg, then general manager of WCCO radio.

The station had decided it wanted a sports director, Haeg recalls.

"Looking things over, I said, 'What about Paul Giel. He is an All-American, established, came back to Minnesota to work, has a lot of friends, good contacts, no skeletons anywhere.'

"On top of that he was a good, wholesome, outgoing person who could generate respect."

Haeg recalls that he threw Giel into the job with little preparation.

"There was a 7:15 a.m. sports program in those days," Haeg said, "and I told Paul we would put him on immediately.

"He said, 'I can't do that right away,' and I told him there is only one place to learn and that is on the air.

"I listened to that first broadcast not so much for the capability of a finished broadcaster but whether Paul could project the kind of person he was. His sincerity and confidence came through although he stumbled a lot.

Giel, too, remembers those early days at WCCO:

"The first two or three years I was there, I would silently hope that the Twins' game would go so long

that I wouldn't have to go on after the game. I was awful. I couldn't enunciate."

Giel spent eight years at WCCO and according to Haeg became "a very fine broadcaster."

Then, late in 1971, Giel received a phone call from university President Malcolm Moos. He wasn't surprised.

"I knew something was going to happen at the school," Giel recalled. "I would be thinking that if we made a change who would be the football coach or the athletic director. I thought Gordy Soltau would be good. He was successful, clean, articulate.

"Then my ego took over. I thought, 'You have the background for it. You have enough maturity now.' Knowing the territory, I wondered if someone might ask me."

While Giel was pondering, so were university officials.

Stanley Wenberg was a vice-president with responsibility for intercollegiate athletics at the time.

"We talked over the need for a change and I suggested Paul Giel," Wenberg said.

"He had built up a remarkable public acceptance. He had a natural way with people that inspired confidence. The reaction was uniformly positive but we were told, 'You can't get him away from 'CCO.' "

Nevertheless, it was decided to give Giel a try and Moos made the call.

After an off-again-on-again change of mind, Giel took the job for keeps in January 1972.

Why did he leave what he calls the "comfort zone" of WCCO for the financially troubled, dissension-riddled university athletic department?

"It was the moment of truth," Giel said. "I had turned down the job once. I felt I belonged at 'CCO. Things were good for me. Then, one day I was interviewing Bud Grant. I wasn't nervous doing the interview the way I was when I started and I thought, 'Is this what you want to be doing in 20 years?'

"I thought, 'Do I have something else to offer? I can accept the challenge and take on what is said to be an impossible situation and turn it around. That's what Paul Giel can do.'

"I really wanted to find out something about myself," Giel said.